

ENVIRONMENTAL QUALITY COUNCIL
September 18 and 19, 1997, Montana State Capitol, Room 104
Original Minutes with Attachments

COUNCIL MEMBERS PRESENT

Rep. Vicki Cocchiarella, Co-Chair
Sen. Ken Mesaros, Co-Chair
Rep. Haley Beaudry
Sen. Vivian Brooke
Sen. William Crismore
Rep. Kim Gillan
Sen. Lorents Grosfield

Rep. Karl Ohs
Mr. Bill Snoddy
Mr. Jerry Sorensen
Ms. Jeanne-Marie Souvigney
Rep. William Tash
Mr. Greg Tollefson
Sen. Bea McCarthy

COUNCIL MEMBERS ABSENT

Rep. George Heavy Runner
Ms. Julie Lapeyre

Sen. Bill Wilson

STAFF MEMBERS PRESENT

Mr. Todd Everts
Ms. Kathleen Williams

Ms. Martha Colhoun
Mr. Larry Mitchell

VISITORS' LIST

Attachment #1

COUNCIL ACTION

- Approved the minutes from the June 3, 1997 meeting.
- Appointed the following subcommittees: Growth Management, Water Policy, Compliance and Enforcement Reporting, and Public Relations.
- Adopted the 1997-98 Council Rules and Procedures. Amendments to the rules and procedures may be added during the interim.
- Requested the Department of Environmental Quality to provide a copy of their policy statement regarding the substantive interpretation of the Montana Environmental Policy Act.
- Requested the DEQ to provide copies of correspondence from the Environmental Protection Agency regarding the interpretation of Montana's self audit law.
- Approved holding meetings outside of Helena. The next meeting will be November 14th in Missoula.

I. CALL TO ORDER AND ROLL CALL

CO-CHAIR COCCHIARELLA called the meeting to order at 8:40 a.m. Roll call was noted; REP. HEAVY RUNNER, MR. SORENSEN, SEN. WILSON and MS.LAPEYRE were excused.
(Attachment #2)

II. ADOPTION OF MINUTES

CO-CHAIR COCCHIARELLA called for a motion to approve the minutes of the EQC meeting held on June 3, 1997.

CO-CHAIR COCCHIARELLA, referring to page 26, asked for clarification of the first sentence of the fourth paragraph referring to a question whether the DEQ was planning to do anything. She suggested the question could be clarified to inquire what the DEQ was doing regarding consistency in evaluating the penalty and enforcement authority specified in the various state environmental statutes.

SEN. MCCARTHY moved to adopt the minutes, with the above-mentioned clarification. REP. TASH seconded the motion. The motion carried unanimously.

III. ADMINISTRATIVE MATTERS - Mr. Everts

MR. EVERTS announced that the EQC staff has moved to new offices on the first floor. The staff will be sharing space with Montana PRRIME, which is a group charged with revamping the state budgeting system. This group is made up of 20 consultants and 25 state employees from various state departments.

MAUREEN THEISEN has put together a summary on the natural resource legislation which was introduced in the past legislative session.

An internet home page is being prepared which will include the agendas, publications, and other activities taking place with the EQC. This should be finalized by October 15.

The EQC had two interns this summer. MARGIE GUSTEFSON, an intern from Montana Tech, provided baseline information for the growth management study. MS. GUSTEFSON is a very energetic mother of five children. She took her motor home to Great Falls and the Flathead area. There was some carry-over funding to cover the cost of her operations. The other EQC intern was ANNE BLANCHE ADAMS. She has attended Stanford and is now attending the U of M Law School. MS. ADAMS wrote the chapter on regulatory impact analysis for the MEPA Handbook and will be revamping the entire handbook later this year.

There have been a number of donations for the Dick Knox Memorial. Forty-eight of his relatives will be in attendance this afternoon for the memorial. A barbecue is planned for 12:00 noon. The program will start at 1:00.

CO-CHAIR COCCHIARELLA commented that at the Legislative Council meeting a week ago, an organizational chart was presented which placed the EQC parallel to all other interim committees. She expressed concern in that EQC is at a different level of statutory appropriateness and should not be in the list with all other interim committees. She felt the EQC deserved a different position and status.

IV. INTERIM OPERATING PROCEDURES AND SUBCOMMITTEE

APPOINTMENTS -Co-Chairs

CO-CHAIR COCCHIARELLA, referring to the draft "1997-98 Council Rules and Procedures" (**Exhibit 1**) which was mailed to the Council members, stated that she asked for a statement to be added to the document which clarified how the Council operates. This is contained in the first paragraph.

SEN. BROOKE suggested the rules and procedures include a statement regarding conduct of Council members during discussions.

CO-CHAIR COCCHIARELLA recalled a meeting wherein filibustering was involved which had an adverse effect on the meeting. She also recalled that a major discussion followed which

addressed respecting fellow Council members. She asked that the minutes of that meeting be reviewed and felt that the Council action may possibly be added to the current rules and procedures.

CO-CHAIR MESAROS remarked that they did not want to constrict open meetings but that maintaining control was important. He questioned whether the Council wished to add more structure to the rules.

MR. TOLLEFSON suggested this could be handled on a case-by-case basis.

REP. OHS felt there should be some wording added regarding public participation at EQC meetings.

CO-CHAIR COCCHIARELLA suggested adoption of the rules and procedures be postponed until the Council reviewed the minutes of the aforementioned meeting.

MR. EVERTS stated he would produce a copy of the minutes. He suggested that this be addressed tomorrow.

Subcommittee Appointments

CO-CHAIR COCCHIARELLA explained that the subcommittee list they arrived at was a guess at what the Council members would like.

The subcommittee members for Growth Management are as follows:

Ms. Jeanne-Marie Souvigney	Mr. Jerry Sorensen
Mr. Greg Tollefson	Rep. Haley Beaudry
Rep. Kim Gillan	Sen. William Crismore

The subcommittee members for Water Policy are as follows:

Rep. William Tash	Sen. Bea McCarthy
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Rep. George Heavy Runner
Mr. Bill Snoddy

Rep. Karl Ohs
Sen. Vivian Brooke

SEN. GROSFIELD and SEN. WILSON indicated that other activities prohibited them from complete subcommittee involvement. The Co-Chairs intended to participate in both subcommittees. MS. JULIE LAPEYRE, who represents the Governor's Office, was not assigned to a subcommittee because it was unlikely that she would be able to participate in subcommittee actions.

V. MONTANA ENVIRONMENTAL POLICY ACT TRAINING FOR COUNCIL MEMBERS - EQC Staff

MR. EVERTS asked the Council members for their feedback regarding the one-hour seminar the staff would be presenting this morning.

MR. EVERTS explained that the EQC was created by the Montana Environmental Policy Act in 1971. The statutory authority of the EQC comes from that Act. This statute is fundamental. When an individual plants wheat, he/she needs to not only look at the market prices and costs for the seed, but also understand what the impacts will be if a ton is planted or a half ton is planted. Individuals need to plan and understand how the plan will impact others. MEPA requires state agencies to think about what they are doing before they do it and it also allows the public to participate in the decision. The Republican Senator who introduced this legislation, George Darrow, viewed MEPA as a governmental accountability act. MEPA covers not only natural and physical resources, but also social and economic impacts. This statute is supplemental to all other state agency environmental and natural resource statutes. For example, if there is a water quality act on the books, MEPA will supplement the act. Agencies document their thinking process and then make the decision to proceed or not proceed. MEPA provides information for the decision maker to make the decision, but does not dictate the results. The factors involved may include environmental and economic factors, politics, agency resources and legal constraints. The process allows for the decision maker to make an informed decision and allow the public to comment on that decision, before it is made.

Most of the environmental and natural resource statutes were enacted during the early 1970s. MEPA was enacted before new 1972the Constitution. There is a court case which states that MEPA does not implement the clean and healthful section of the Constitution, because it was enacted before the Constitution. MEPA passed the House 101-0 and the Senate 51-1. There were extra senators and an extra representative present during the session prior to the Constitutional Convention. Another proposed bill, called the Environmental Protection Act, would have allowed people to substantively sue state government if they felt certain criteria was not fulfilled in terms of environmental protection. This would have allowed enforcement of very broad principles. There was a lot of contention with regard to this legislation. It had an adverse committee report in the Senate, six to five, and then lost by two votes on the Senate floor. That act was a wedge breaker for MEPA. Once the Protection Act bill was voted down, people viewed MEPA as innocuous and it passed overwhelmingly.

The sponsor created the Environmental Quality Council. It was his feeling that legislators did not have an opportunity to become involved with the significant and fundamental natural resource and environmental issues facing the state. No other environmental policy act in the United States has a body like the EQC, as this body is usually placed in the Executive Branch of a state government.

SEN. GROSFIELD asked when the National Environmental Policy Act (NEPA) was passed. MR. EVERTS explained that the NEPA passed in 1969. MEPA was patterned after NEPA except for the EQC and the insertion of "Montana" for "the United States".

MR. EVERTS remarked that MEPA is procedural in that it is a process which requires agencies to think, document their thought process, and allow for public comment. It does not mandate the results of a decision. There are some exceptions which are termed "substantive MEPA". An agency may utilize MEPA outside of its permitting statute to mitigate certain impacts. They may use MEPA as authority to mandate that mitigation occur. There is a district court decision which made MEPA substantive for hard rock mining. It allowed the DEQ to utilize MEPA to mitigate impacts which are outside of their permitting authority to force the entity to mitigate. The Fish,

Wildlife and Parks Department has used this Act outside of its permitting authority to enforce mitigation for neutering captive grizzly bears in an area adjacent to wild grizzly bear habitat. The district court held this as a legitimate use of the Act.

MR. EVERTS posed the question, "Why is this Act on the books after all these years?" He has heard from a variety of people from both sides of the aisle, and all sides of the political spectrum who wanted to use this Act to prompt good state decisions. At the state level, groups have asked judges to tell the state agency to use the required procedures to arrive at their decision. This gets back to the governmental accountability issue-- citizens expect good decisions. The Act has basically remained the same since its inception. SEN. MESAROS' bill supplemented the Act by telling agencies they needed to look at regulatory impacts on private property. It also clarified the economic impact analysis portion of MEPA.

MR. EVERTS explained that the objectives of MEPA are to consider the environmental and human impacts of the agency's proposed action and ensure that the public is informed of and participates in that decision making process. The basic MEPA Implementation Framework asks several questions which include: When do agencies need to use MEPA? If they do use it, what type of documentation is necessary? Should this documentation be an environmental assessment (EA) or an environmental impact statement (EIS)? What level of public involvement should there be in this process?. How is the document used in the decision making process?

The first concern for a state agency is to determine whether it has an action which is subject to MEPA. The term "action" is very broad and has been defined in the MEPA Model Rules as any program, project, or activity undertaken by the agency itself which may be supported through contract or grant, subsidy or loan. Some exceptions would include administrative actions which do not have an impact on the environment; minor repairs and maintenance of existing facilities; investigation, enforcement, data collection activities; ministerial actions such as obtaining a fishing license if the individual meets the requirements; and actions which are primarily social or economic in nature that do not affect the human environment. There are also "excluded actions". An agency may put actions into categories and if the impact is negligible it may be categorically

excluded. There is an emergency provision as well. If there is a fire, the first action is to put the fire out. The state agency which reacts to an emergency needs to notify the governor and the EQC of its actions and the general impacts of the action.

MR. EVERTS commented that a doctor and his family visited him last week regarding a prison facility being proposed for a property near their home. They felt this was subject to MEPA review. If the Department of Corrections is involved and there is a permit issued for the facility, that could be an action which would trigger this process.

MS. COLHOUN explained that once a decision that some level of environmental review is required, the agency needs to decide the form of the environmental review. There are four forms of environmental review which include: an environmental impact statement, an environmental assessment, a mitigated environmental assessment, and a programmatic review, which is appropriate for a series of agency initiated actions. The agency would first want to determine how significant the impacts would be on the human environment. This would involve such items as the severity, duration, and geographic extent and frequency of the impact; the probability that the impact will occur; the reasonable assurance that the impact will not occur; growth inducing aspects of the impact; the quantity and quality of each environmental resource; any precedent that would be set as a result of a proposed action; and potential conflict of local, state or federal laws or requirements.

An action which has significant impacts on the human environment would call for an EIS and then agency decision. However, the agency has discretion to prepare a mitigated EA. A programmatic EIS is where an agency is initiating a series of actions which may create significant impacts on the human environment.

REP. GILLAN asked if there was a mechanism for the public to object to an agency's determination of level of significance. MR. EVERTS explained the public could submit comments to the agency if they knew an EA was taking place.

MR. EVERTS provided the Council members with copies of various EIS and EA documents. The agency needs to identify why it is taking an action. This usually correlates with statutory mandates. The agency next needs to describe the present situation and then project what impacts will be caused by the proposed action. It needs to consider reasonable alternatives. Sometimes the alternatives are put out for public comment.

MR. TOLLEFSON questioned whether there were any guidelines for the agency to use to determine the boundaries of the affected environment. MR. EVERTS felt that in order to understand what the impact would be, the agency needed to know what impacts would be involved. The initial boundaries may need to be extended due to cumulative impacts.

MS. WILLIAMS defined public participation as a process by which interested and affected individuals, organizations and agencies were consulted and included in the decisionmaking of an agency. If people are being affected who do not attend public meetings, the agency has a responsibility to seek out the individuals. One of the most important initial steps involved in MEPA is issue identification which is called "scoping". The decision is not simply the end result since decisions are made throughout the process. Referring to the procedural requirements of an EA versus an EIS, MS. WILLIAMS stated the main difference between the documents is discretion of public involvement. In an EIS, public involvement is required, there are mandatory timelines, revisions must be made according to substantive comments, scoping is necessary, comments and commentors must be displayed in the final document and the agency must respond. All EAs are up to agency discretion except in the case of a mitigated EA, which must receive public comment. MS. WILLIAMS provided the Council with a copy of a newsletter prepared by the U.S. Forest Service for use in preparing an EIS on the harvesting of Pacific Yew for the generation of taxol, a cancer inhibiting drug (**Exhibit 2**). They answered popular questions; provided the public with names, addresses and phone numbers of people to contact; and solicited comments.

SEN. GROSFIELD questioned how often an agency would start with an EA and then proceed to an EIS as the result of public participation. MR. EVERTS felt the instances would be very small.

SEN. GROSFIELD felt the agency needed to justify their decision for choosing an EA instead of an EIS by providing a statement in the document. MR. EVERTS stated the statement on whether an EIS is required is set out in the MEPA rules. SEN. GROSFIELD expressed concern that certain agencies may always chose to prepare an EA instead of an EIS. MR. EVERTS stated that the bulk of the documents prepared were EAs.

MR. EVERTS continued by discussing how the MEPA document can be utilized in the agency decision-making process. People with expertise in various areas used their combined talents in preparing the document. The document which is presented to the public and the decision makers needs to be both factual and unbiased. The decision maker produces the record of decision. The decision maker is paid to be biased in that he/she is paid to uphold the laws, recognize the agency resource constraints, and listen to the public and the governor. The decision maker is paid for his/her judgment. MEPA asks state government to make an informed decision.

MS. SOUVIGNEY asked to what extent the MEPA processes would include future actions or decisions which are objectives but not within the authority of the decisions makers. If most of the alternatives included future scenarios which need either additional analysis or rule making, would that be included in the document. MR. EVERTS explained that MEPA is supplemental to the existing authority. The purpose of MEPA is to come up with ideas which will improve the situation. Once the future action is taken, there may be need for additional review.

MR. EVERTS referred to the "Regulatory Restriction Analysis" (**Exhibit 3**) which was prepared by MS. ADAMS. This involves a bill which was presented by SEN. MESAROS and was passed during the 1995 Legislative Session. State agency guidelines were developed during the last interim. The Council requested that when the MEPA Handbook was updated there would be direction on this process. MEPA requires economic impact analysis. SEN. MESAROS' bill

clarified a segment of that economic impact analysis for state agencies. This stated that when an agency was conducting an economic analysis it would analyze the regulatory impacts or restrictions of the proposed action on private property. A regulatory restriction analysis is required when (1) there is a MEPA document, (2) private property is involved, (3) a regulatory restriction is being applied, and (4) the agency has discretion.

VI. DEPARTMENT OF ENVIRONMENTAL QUALITY OVERVIEW OF MEPA
ACTIVITIES FOR THE 1997-98 INTERIM - Van Jamison, DEQ

VAN JAMISON, Administrator of the Planning, Prevention, and Assistance Division within the Department of Environmental Quality (DEQ), referring to the earlier question regarding substantive versus procedural MEPA, commented that the DEQ had been attempting to clarify an agency-wide policy regarding MEPA implementation. The agency has decided to interpret MEPA to be substantive unless there is an expressed prohibition in statute. This means DEQ will interpret MEPA to confer upon their director additional decisionmaking authority to condition permits beyond what is explicitly outlined in the permitting statute. From the perspective of how the terms “substantive” and “procedural” are used at the federal level, they look at MEPA as being procedural. That would mean that the director does not have to use this additional discretion to mitigate an impact that is identified during the environmental analysis of a phase if he so chooses. It is very clear that that MEPA is to be interpreted substantively in regard to the Hard Rock Act and it is clear that they interpret it as procedural under the Beaver Creek decision with regard to the Subdivision and Platting Act. With regard to the other statutes they administer, they will be interpreting MEPA to be substantive in the sense that that term is used within the State of Montana.

SEN. GROSFIELD remarked that this policy was a very significant departure from the past. He further commented that he carried a bill in the last session which would have made MEPA substantive in limited cases and that bill was killed. He asked for further clarification of their substantive view of MEPA. He felt this could give a director a great deal of power.

MR. JAMISON explained that the additional authority would be used to address impacts which were significant to attempt to cause the impact to no longer be significant. There is no blanket authority to condition. This is only targeted at impacts which are significant and there have been measures identified which could cause the significant impact to be reduced.

SEN. GROSFIELD questioned whether the MEPA would be used substantively to require mitigation.

MR. JAMISON stated that was what they were attempting to accomplish. Adding mitigation is an exercise of the state's police power and can only be used where the impact is significant and the mitigation would make it not significant. Any other mitigation would need to be agreed to by the applicant.

SEN. GROSFIELD felt the determination of significance could involve a subjective process. He felt there was a lot of open space for a director. He also was concerned about the amount of subjectivity in the extent of mitigation. If someone wished to frustrate a project, they could come up with mitigation which was not economically feasible.

MR. JAMISON stated that the MEPA analysis dealt within the realm of what would be technically and economically feasible. If the proposal was not reasonable, it would not be considered in the EA. The decision maker would need to clarify in the record of decision the rationale for the choice. This would allow judgement of the reasonableness of the decision and allow challenge.

CO-CHAIR COCCHIARELLA asked what authority the DEQ was using to make these decisions.

MARK SIMONICH, Director of DEQ, commented they have been looking at the authority contained within MEPA as well as the authority that is given under any specific statute which would require the Department to make a decision. The authority is described in other statutes

and MEPA describes the process needed to determine how to arrive at the decisions. He felt they were conforming with the intent of MEPA. The process is to determine all the potential impacts, especially the significant impacts. When they say MEPA is substantive, they do not believe it was intended to be a process for just jumping through hoops. They believe the intent of MEPA was to look at issues substantively to determine the cause and effects and then deal with the impacts. The amount of discretion the Department has in making permitting decisions and applying stipulations, restrictions or conditions on that decision goes back to the specific statute.

MS. SOUVIGNEY questioned what was different today, if those mitigation measures have been used in permitting in the past.

DIRECTOR SIMONICH felt they were clarifying that when the Department reaches the decision making phase, the mitigations which they may place on a permitted use will be based on the information raised in the EIS.

SEN. GROSFIELD asked if there had been cabinet level discussions regarding this issue.

DIRECTOR SIMONICH stated there hadn't been cabinet level discussions. He had discussions with counterparts including Bud Clinch, of the Department of Natural Resources and Conservation.

MR. JAMISON stated that within the DEQ the determination of preparing an EA versus an EIS is based on whether or not the impacts of the proposed action would be significant and whether or not the agency has an adequate amount of time to prepare an EIS in the event that an impact is significant. The permitting function has been separated from the EIS and audit functions within the DEQ. If a proposed action were to have a significant impact, but they would not have enough time to prepare an EIS, they would use the provisions under MEPA, which state that they are to comply to the extent possible, and they would also use the rules, which identify that the

legitimate use of an EA is to deal with environmental impact disclosure when there is not sufficient time to prepare an EIS.

SEN. GROSFIELD asked for an example of not having enough time to prepare an EIS.

MR. JAMISON stated that under the Subdivision Act they are required to make a decision within 120 days, when an EIS is necessary. That is not enough time for a draft EIS, commenting period, and a final EIS. This would be disclosed in the EA.

MR. JAMISON continued by stating that MEPA is not a regulatory statute. It is an informational, analytic and public participation statute. Information is the key. An applicant may need a variety of permits to accomplish an action. MEPA is triggered as soon as the agency receives its first application.

The major projects they are working on are: the Golden Sunlight Mine EIS; ASARCO Rock Creek Mine - Supplemental Draft EIS; Stillwater, Hertzler Impoundment EIS; and the McDonald Gold Project EIS.

The Golden Sunlight Mine EIS is being prepared to address a court order for an EIS on the original proposed operating mine and also to evaluate a proposed amendment, which is an expansion to the existing mine operation. The mine operating permit was analyzed using a mitigated EA. Late in the process, water issues emerged and the agency added mitigation to address those water impacts but didn't have time to evaluate the effectiveness of the mitigation measures. A predecessor agency was taken to court and was told to evaluate the effectiveness of those mitigations in an EIS. They anticipate a draft EIS will be mailed to interested parties by the first of October. The comment period will close in December. A final EIS will be completed by mid-March.

A draft EIS has been circulated on the ASARCO Rock Creek Mine. The company has come in with an alternative method of disposing of its tailings. A supplemental draft EIS was necessary

and should be mailed by December 22nd. There is a great deal of interest in this project in Idaho, thus hearings have been scheduled in Sandpoint and Noxon.

SEN. GROSFIELD asked if MEPA required hearings in other jurisdictions like Idaho.

MR. JAMISON stated they try to err on the side of more public involvement instead of less. DEQ is required, through State water laws, to ensure that water quality violations are not sent to other states. The Governor of Idaho has asked that Montana be very mindful of his citizens.

The Stillwater, Hertzels Impoundment EIS involves an application to amend the mine operating permit for the Stillwater Platinum Palladium Mine outside of Nye. They are proposing to pipe mine tailings four to seven miles from the mine site to an impoundment location which they have acquired. The Department anticipates mailing the draft EIS by November 20th and should have a final EIS prepared by the end of June of 1998.

The McDonald Gold Project is an EIS on a mine operating permit application for a gold mine eight miles east of Lincoln. DEQ has completed the scoping process and developed possible alternatives. The draft EIS should be ready by next summer.

The meeting recessed for a lunch break followed by the Dick Knox Capital Grounds Tree Planting Memorial.

SEN. MESAROS called the meeting to order at 2:00 p.m.

SEN. GROSFIELD related that the issue of MEPA being interpreted as substantive as opposed to procedural has been a very controversial issue. This could apply to a lot of agencies. MR. JAMISON mentioned there has been some court set precedents which make MEPA substantive. SEN. GROSFIELD continued that the bill he introduced last legislative session, which was killed, authorized almost exactly what the DEQ has decided to implement on its own. He asked

the agency if they had adopted a policy statement regarding the substantive approach of MEPA with respect to mitigation of significant impacts.

MR. JAMISON stated they were preparing a formal written policy statement with respect to how their agency intends to implement MEPA.

SEN. GROSFIELD questioned whether this was an internal process or a public process: had the public been provided notice and opportunity for comment?

MR. JAMISON replied that to date it had been an internal process which has involved the senior management team throughout the DEQ.

SEN. GROSFIELD felt it was imperative that public input and involvement be included before the agency proceeded. Since the DEQ is the largest environmental permitting agency in state government, he felt other agencies would follow their lead. A future administration might take advantage of this procedure in a political sense when it came to subjective decisionmaking? He cautioned the agency to proceed cautiously.

MR. TOLLEFSON disagreed with SEN. GROSFIELD. He stated that what he heard this morning was completely different. He heard DIR. SIMONICH and MR. JAMISON acknowledge that the result of an EIS will be a part of their decisionmaking. He also heard them say that that decisionmaking would be applied at the discretion of the Director. He asked does that change anything that currently exists or is it simply acknowledging to the general public that the results of an EIS are used in decisionmaking. He doesn't feel that any lines of authority have been breached.

MR. JAMISON contended this doesn't change anything with the statutes which preclude them from using a substantive process, nor does it change anything with respect to the Hard Rock Mining Act where they are required to use a substantive application. This would be a useful process where they are involved in a joint permitting process with the federal government and

the federal government does not interpret NEPA in a similar fashion. Where the situation is significant, they would have the discretion to add mitigation to make it not significant. If it was not significant, they would need to have the applicant's approval.

MS. SOUVIGNEY questioned how this would differ from a mitigated EA.

MR. JAMISON explained that what he found interesting about a mitigated EA is that MEPA is used substantively. It is acknowledged that the mitigation is necessary even if it goes beyond the statutory requirements to make the impacts fall below the significance criteria. It must be imposed and there needs to be demonstration that it is sufficient in addressing the impact.

JOHN NORTH, Chief Legal Counsel for the DEQ, stated that mitigated EAs could be based on a substantive MEPA but they can also be based on an agreement by the applicant that they are willing to bind themselves to mitigate so as to avoid the necessity to have an EIS prepared. This is the way the Hard Rock Mining Act and the Coal Act have been administered since the 1986 court decision. In regard to the areas administered by the Health Department (DEQ's predecessor agency), with the possible exception of the case of the Church Universal and Triumphant, this did not arise because the Health Department mainly prepared EAs. When looking at a mine permit, the Department is looking at the entire site. The agency has authority to make a decision on the site and the operation. When looking at a water quality discharge permit, the federal courts have looked at the scope of the EIS and have narrowed the scope of what constitutes the agency action. A substantive application of NEPA can only mitigate impacts that are within the federal action. He asked, if MEPA is substantive, what is the scope of the EIS. With regard to mines, the scope would be the entire mine because they permit the entire mine. With regard to discharge permits, the scope may not be that broad.

SEN. MESAROS asked when the policy statement would be completed.

MR. JAMISON stated this was his responsibility and he would be completing it as soon as possible.

SEN. MESAROS asserted that the EQC would like to review the policy statement. The next meeting is on November 14th. He asked that the statement be available for the Council's review at that time.

SEN. GROSFIELD was still very concerned about the lack of public review. Since the agency would be using substantive MEPA for significant impacts, he questioned why they would not be using it for nonsignificant impacts.

MR. NORTH stated that it could not be used for nonsignificant impacts because mitigation of significant impacts constitutes a valid exercise of police power. It needs to reflect back to some authority of government to protect public health, safety, and welfare of the environment.

SEN. GROSFIELD questioned whether the determination of an impact as significant or nonsignificant was subjective.

MR. NORTH stated the agency's uniform MEPA rules state the factors a decisionmaker considers in determining whether an impact is significant or not. It is still a judgment call.

Public Comment

John Bloomquist, Montana Stockgrowers' Association, contended that treating MEPA substantively instead of procedurally was news to him. He asked the Council to become involved with this issue. He felt that the public should receive notice and be allowed comment regarding the policy change: MEPA is a procedural statute.

SEN. GROSFIELD asked DIR. SIMONICH to respond to the request for public involvement.

DIR. SIMONICH contended that what was discussed this morning is not a significant change from business as usual. It is merely a significant clarification of why the state has MEPA. A strictly procedural MEPA would give a message to the public that the Department does not care about the comments the public gives. There is a much higher burden on the Department to

create a credible record of evidence regarding why they make a decision if the MEPA process is not substantive. They inherited three different previous agencies that may have viewed MEPA in somewhat different fashion. The Department of State Lands was routinely involved with developing an EIS. The Department of Health routinely developed EAs. The DNRC operated under the Major Facility Siting Act. They found it important to come together with a singular policy within the Department to provide guidance to their staff throughout. They intended their policy to be within the context of the statutes and the rules established according to the statutes. Both the statutes and rules require public participation. They are willing to consider the best way to reach out to the public and explain the policy they are attempting to develop and look for input.

SEN. MESAROS remarked the Council looked forward to tracking this issue and reviewing the policy statement as the process evolves.

VII. MONTANA NATURAL RESOURCE AND ENVIRONMENTAL ISSUES

UPDATE

MR. EVERTS explained this was a new agenda item. He asked the Council to review the forthcoming presentations with a critical eye. The sources of their information are the daily newspapers and state government activities.

MR. MITCHELL reported on recycling issues. Since May, the City of Billings landfill has been separating the white goods (appliances, washing machines, hot water heaters, etc.) out of the landfill in an effort to save space. They were also able to sell the white goods to a recycler from Wyoming who has offered to pay the city \$1,300 to bale the material and transport it to Denver and sell it as recycled metal. In Stillwater County, approximately 322,000 tires are piled up six miles east of Columbus. This occurred as the result of a tire recycling operation which lost its market. The DNRC has filed suit against the operator of the site, because this involves a trespass issue with state lands. Also the DEQ has filed suit regarding licensing violations. Flathead County Solid Waste District in Kalispell has run out of gas. Methane extraction systems were required to be installed at this type of landfill. This is a large vacuum which pulls methane

together and flares it off. There isn't enough methane to keep the fire going so they are now back to the drawing board. The county junk vehicle graveyard is also at that location. They have put together the first fluids recycling operation. They extract anti-freeze, lubricants, gasolines, etc., prior to recycling the vehicle. Kalispell is using the lubricants and waste oils to heat the maintenance buildings on site.

In the Swan Valley there is a timber sale where the DNRC has sold five million board feet of lumber to Plum Creek for \$1.25 million. An interest group has sued the DNRC for this sale alleging that under MEPA, the DNRC did not properly account for the impacts of the sale on old growth and wildlife. If an injunction is brought, the DNRC is prepared to ask the court, under a 1995 law, to ask that a bond be provided by the plaintiffs to reimburse the state trust beneficiary for interest lost on the \$1.25 million anticipated revenue from the sale should the suit be unsuccessful.

MS. COLHOUN remarked that at a recent meeting of the governors of the states surrounding Yellowstone National Park, the governors asked the federal government to put in more money toward management of grizzly bears and wolves.

A newly passed federal tax bill would provide an additional estate tax break to family farms and ranches. A person can deduct, for gift tax purposes or estate tax purposes, the value of a portion of land donated to a qualified organization for conservation easement. The executor of the estate of a decedent can elect to donate a conservation easement and can then exclude from the estate, for estate tax purposes, up to 40% of the value of the land with the conservation easement on it or in 1998 up to \$100,000, and by the year 2002, up to \$500,000. This new legislation provides the opportunity for a conservation easement to be placed on the land after the person's death.

Recently citizens groups gathered in Corvallis, the site of the proposed undivided four-lane highway from Hamilton to Lolo. The groups expressed their concerns and insisted that building a bigger highway would spur more growth and transform the communities along its pathway.

Missoula has formed a Growth Management Task Force. They met to look at a 133- page Missoula urban comprehensive plan.

MS. WILLIAMS commented that Glacier National Park issued a draft park management plan last summer which proposed to close down a motel and campground in the Many-Glacier area. This was met with controversy and they will be introducing a new draft management plan this fall.

Yellowstone has recently issued a permit for researchers to sample geothermal pools for research into the possible uses of microbes.

The sewage plant at Old Faithful Lodge is 50 years old and not doing too well. The ground water is being partially impaired. The cost for a new plant will be \$5 million.

The DNRC has issued a grant for a study of return flow in the Big Hole Basin. The results will be presented to the Big Hole Watershed Committee.

The Flathead Basin Commission adopted their target TMDLs. They will have a public meeting in Whitefish in October.

The first private lease of instream water rights, under a law which passed in 1995, has been completed. It is on Rock Creek for 1.3 cubic cfs. The biologists feel that will help the cutthroat population in the area.

Crown Butte continues to be in the news with President Clinton's preferred bill being considered this week which would provide \$65 million in cash. Rep. Hill's alternative plan will follow that.

VIII. COUNCIL MEMBER UPDATE ON NATURAL RESOURCE AND ENVIRONMENTAL ISSUES AFFECTING THEIR DISTRICT

CO-CHAIR MESAROS commented on a water diversion on the Sun River wherein upstream users have had some property damage. This stretch of river is being surveyed by an independent third party. Another problem is an area which has an elk population that is dramatically increasing on private lands. Fish, Wildlife and Parks is looking into possible solutions, but this will not be a small task.

SEN. MCCARTHY portrayed positive aspects in her area. The Old Works Golf Course opened this summer which is on top of a portion of the largest Superfund site in the United States. The response to the golf course has been overwhelming. In the process of working on the Old Works they discovered that the slag pile is a nontoxic substance which can be used for many things and is now being used to line a water pipeline being constructed from Silver Lake to Butte. This is being used as a cushion for the pipe. The Warm Springs Ponds clean up is complete. The leak at the East Fork Reservoir has been repaired. On the down side, there has been a huge infestation of noxious weeds in the wild sheep preserve on Lost Creek.

REP. OHS commented that growth is a concern in his area. The popularity of the Madison area is bringing growth issues to the forefront. Another issue has been the fishing access problem. The county commissioners shut off access to the streams next to the bridges. Private citizens did not think that was right.

MR. TOLLEFSON related that between 1990 and 1995 Ravalli County grew by 30%. During the same time, Missoula County grew by 15%. The social and economic implications are a daunting reality. The Missoula Growth Management Task Force has been working diligently and has acknowledged that growth is a fact of life in Montana. The noxious weed problem is increasing. The reintroduction of grizzlies to the Bitterroot is certainly a hot issue.

MR. SNODDY related the interests in the Lincoln area are TMDLs, bull trout and cutthroat trout listings, and timber sales. The Disciples of Christ Church has a lodge on the Blackfoot River

and some of their levies have washed out. They are having trouble getting permits from the EPA to reestablish the levies and reclaim the land.

REP. TASH stated he is optimistic about the return flow studies of the Big Hole River. He gave notice that the Compact Commission is meeting in Lima next week. This is in regard to water rights at the headwaters of the Missouri River system. Wildlife conflicts continue in his area, but this is spotty.

REP. GILLAN stated the issue of growth arose this summer with annexation issues in Billings. Late July storms caused people to seek out floodplain maps. Some of the floodplain maps have been redone.

REP. BEAUDRY stated one of the problems in his area is public access for hunting and fishing. In the last few days he has had some calls regarding a place near Helena where biologists counted 60 mature bulls in a small area in July. Last week there were only five left. Apparently a group of poachers took the bulls and shipped them to China. There is a similar situation in an area near Wisdom which is down to two mature bulls. Another concern is what has caused the number of bees this summer. Butte is experiencing a huge amount of growth with a \$600 million project on the outskirts of town which has changed the complexion in this area. Mining exploration is down this year.

SEN. CRISMORE felt the issue of floor drains in the Libby area is progressing. They have had great cooperation from the Governor's Office and the EPA. Of the 79 requests which have been sent out, only eight individuals have not complied. Lincoln County and part of Flathead County have the worst weeds imaginable. It is a tansey ragwort. One stalk of it in a bale of hay can kill a cow. The Forest Service is working on the problem. He felt that they should spend whatever money is necessary to stop it in its present location because it is fast moving and if it spreads statewide, it will cost millions to contain.

MS. SOUVIGNEY remarked the big issue in her area is too much water at the wrong time. They have had two years in a row of 100-year floods. There is a concern regarding the kinds of projects which have been implemented along various parts of the Yellowstone River. Livingston put in a large dike which caused a lot of concern from nearby landowners. The dike was constructed to protect the schools which have been built just above the flood plain. The Governor's Office is looking into funding for an analysis of the Yellowstone River. Growth is also an issue of concern. The county commissioners just approved a planning district east of town which was started by the landowners to limit the size of subdivisions in that area, which extends to the Sweetgrass County boundary. There are now three planning districts in Park County which have been formed by citizens.

SEN. BROOKE remarked that there was flooding in a new development area in Missoula. The owners experienced flooding from groundwater in their new houses. Attention was paid as to whether the engineering and scoping of that area revealed whether or not the development was in an appropriate area. Traffic congestion is also a problem in the Missoula area. She felt that public transportation was needed.

SEN. GROSFIELD stated growth is a big concern. The flooding on the Yellowstone River is a big problem. People make changes on the river which helps alleviate their problem, however it causes problems for people across the river, upstream or downstream. Aerial photos show where a dike can cause many problems. Without the dike, approximately one third of Livingston is in the floodplain.

CO-CHAIR COCCHIARELLA remarked about a hazardous waste program where households in Missoula were allowed to drop off paint, stains, latex paint thinners, household batteries, etc.

IX. GENERAL WATER POLICY UPDATE

MS. WILLIAMS introduced the speakers for this agenda item and distributed a memo regarding general water policy updates for the interim. She requested Council members review the proposals and provide staff with any comments.

1. Montana Wetlands Activity Update - Ms. Lynda Saul

Lynda Saul, DEQ Wetlands Coordinator, remarked that the Wetlands Council is looking at options to formally organize the council. The Governor has offered to create a Wetlands Advisory Council through an executive order. She requested the EQC to become involved in the Governor's Advisory Council on Wetlands. She introduced Mike Murray from the Montana Water Resources Association, Don Allen from the Western Environmental Trade Ass., and Louise Moore, a Bureau Chief for the DEQ.

The National Wetlands Forum recommended that the nation establish a wetlands protection policy to achieve no overall net loss of the nation's remaining wetland base by acreage and function. If a real estate developer applies to the Corps of Engineers for a 404 permit to fill in a wetland area, they would receive that permit with a mitigation requirement to make up those lost wetland acres and functions in terms of mitigating in another place to either create a new wetland or restore or enhance an existing wetland. In that situation, there would be no overall net loss.

The U. S. Environmental Protection Agency recommended to states that they prepare state wetland conservation plans. This was encouraged through a grant program in 1990. The Montana Department of Health and Environmental Sciences was given funding to start a wetland conservation strategy for Montana in 1994. A Wetlands Council was developed to continue discussions on wetlands issues and to develop a conservation strategy for wetlands in Montana.

Governor Racicot has produced a public service announcement for the Montana Wetlands Council. At a meeting in May, the Governor said he has received more widespread public support for that PSA than for any other PSA that he has made.

To start the development of the Wetlands Conservation Strategy, the Council surveyed 70 Montanans regarding their issues and concerns on wetlands. The mailing list currently contains 200 individuals. Thirty to fifty are attending the quarterly meetings. A Strategy Working Group Subcommittee was created approximately a year ago. They are in the process of reviewing the third draft of the conservation strategy. The goal for Montana's wetlands is to achieve a no overall net loss of Montana's remaining wetlands. A long term goal is to increase Montana's wetlands resource base. Montana has no inventory of its wetlands resources. There is a national wetland inventory which has covered about 48 states and Montana has had small pieces of that inventory, but Montana has not been prioritized. The Wetlands Council encourages voluntary wetland conservation on private lands, enhancing wetlands conservation on public lands, providing resources for interested persons or groups and improving regulatory programs through increased coordination and guidelines of consistency through the different programs.

They would like to start holding public meetings throughout the state. The Water Course in Bozeman has received an EPA grant. They propose meeting with special interest groups such as realtors, developers, agriculture representatives, and environmentalists. They anticipate the final Conservation Strategy would be adopted as a component of the State Water Plan. The statute allows the DNRC to adopt studies made by other competent water resource groups. The process of the State Water Plan is that the wetland conservation section would be adopted by the DNRC Director and reviewed by the EQC and the Legislature.

The Council would like to organize on a more formal basis. The Governor is interested in creating an advisory council. This would increase participation of a balanced group of diverse interests. The members of the Council would help oversee public involvement, the adoption of the final conservation strategy and work on the initial implementation of the plan. Several members of the current Council would likely be nominated to the Governor's Council. They would then seek out representatives to fill in the holes of the interest groups who have not been able to attend. They would like to have the council in place by early next year and also to run the plan section through the Legislature in the 1999 Session. She requested the EQC's

involvement in the Wetlands Advisory Council and asked if one or two members would serve on the Wetlands Council.

MR. TOLLEFSON asked about the regulatory authority for wetlands.

MS. SAUL stated the U.S. Corps of Engineers operates a dredge and fill permit program. They have a responsibility to consult with the DEQ to ensure this activity complies with the state's water quality standards program. The other entities which oversee wetlands are the EPA and the U.S. Fish and Wildlife Service.

MR. TOLLEFSON asked if the no net loss concept was currently a part of the regulatory program.

MS. SAUL stated that it was through mitigation requirements on a permit. They first look in the basin and at equivalent kinds of wetlands. It then steps down to creating wetlands out of the basin. The conservation strategy is intended to be a comprehensive strategy, so the regulatory component was included but they recognize there are many other voluntary actions which can cover wetlands not covered in a regulatory program.

REP. OHS asked what defined a wetland.

MS. SAUL stated there was a federal definition for regulatory reasons.

REP. TASH stated there are ranch property owners on the Beaverhead who are involved with the U.S. Fish and Wildlife's cost share wetlands enhancement programs. The purpose of the program is to create more rush vegetation and nesting areas. It doesn't preclude their ability to produce crops and livestock. He asked how the state would be involved with this program.

MS. SAUL stated this was the Partners for Wildlife Wetlands which is a federal program. One of the components of the strategy would be to educate private landowners about the program.

MR. SNODDY stated his office is preparing creative wetlands information which they would make available to the Wetlands Council.

REP. BEAUDRY asked if Montana planned to have the federal government prepare their wetlands inventory.

MS. SAUL stated one of their strategies is to encourage the federal government to inventory Montana's wetlands. Other states have accomplished this through a cost share program. It is a federal mandate which was started 21 years ago.

2. *Water Information System Update - Mr. Jim Stimson*

MR. STIMSON presented a handout on the Montana Water Information System (**Exhibit 4**). The Natural Resource Information System (NRIS) program was created by the 1985 Legislature to make it easier to access and use information on Montana's natural resources. The Water Information System was created due to the fact that much water data was not accessible in a useable format. In response to a recent survey, they found that information on wetlands is in high demand. Surface water quantity and quality information as well as ground water quality and geology information are also topics of interest. The Water Information System averages approximately 500 requests annually. The internet has added to their ability to provide information. There are approximately 140 to 170 users per day extracting information from their web pages. There were 5,000 users in July and 4,000 users in August of this year. Their goal for this biennium is to increase the information on the internet. They will be creating a wetlands clearing house page. They are redesigning their web pages to make them more efficient. Subject matter which may be of interest to the user will be highlighted when used in text. When the user clicks on the highlighted subject, the user then automatically goes to that page.

Another goal for the biennium is drought monitoring. MR. STIMSON stated he is working with the DNRC and the National Weather Service for more information and maps that could be used.

They are adding software and technology to their web site which will allow them to put a GIS application on the web so a user could develop map layouts for information they are requesting. They could then save this information on their home computer and print on their own printer. They have temporary use of the software for six months, until they can find a way to pay for it. Agencies could use this as an internet. One section of an agency could be looking at public drinking water supply wells, another could look at where septic system pumpers are proposing to dump sewage, etc. This tool could facilitate different sections of an agency being able to look at the other section's data and put that into their decisionmaking process when writing permits.

He invited the Council members to visit the NRIS site at the State Library.

MS. SOUVIGNEY questioned how many potential users would have the necessary software to be able to use the information.

MR. STIMSON explained that the only software necessary was a web browser or Microsoft Explorer. Most users will already have that built into their computers and would not need to buy any additional software.

X. COMPLIANCE AND ENFORCEMENT MANDATORY REPORTING (HB 132)

MS. WILLIAMS remarked that she sent two memos to Council members prior to the meeting. One memo contained a summary of a meeting which she had with agency representatives regarding advance planning for the implementation of HB 132. She asked the Council if perhaps there should be a smaller group coordinating with her and other agency representatives on the implementation of HB 132.

CO-CHAIR COCCHIARELLA asked if there was a sample reporting format.

MS. WILLIAMS provided the Council with the sample reporting format (**Exhibit 5**). HJR 10 defined the programs to be included in a very broad manner and enforcement tools included education, technical assistance, and other compliance tools not typically considered to be

traditional “enforcement” tools. HB 132 did not repeat the definitions. There are questions as to whether the definitions carry forward or only the a more formal regulatory program should report.

CO-CHAIR COCCHIARELLA recommended a subcommittee be formed to look at the sample format. She suggested that perhaps the people who worked on the Compliance Enforcement Subcommittee last interim would be members of the subcommittee.

CO-CHAIR MESAROS stated that without objection they would form a subcommittee to work on this sample format. The members of this Subcommittee are MR. TOLLEFSON, MS. SOUVIGNEY and CO-CHAIR COCCHIARELLA.

XI. WASTE TIRE WORKING GROUP UPDATE - Mr. Mitchell

MR. MITCHELL referred to the memo he sent to Council members (**Exhibit 6**). The working group will be making recommendations to the Council for acceptance or rejection. The working group plans to finish in less than four meetings. There weren't a lot of problems identified. Landfills are still available for tire disposal. Page three of the memo can be turned into an agenda for the next working group meeting which will be held two days before the next Council meeting.

REP. TASH commented that an interesting use of tires was to band them together and use them for culverts. The idea was to entrap sediment as they were placed horizontally in areas which needed drainage.

MR. MITCHELL related a comment he has heard is that we have enough tires to present us with a problem but not enough to provide us with a solution, especially when you consider that they are scattered throughout the large state of Montana.

XII. VOLUNTARY BEST MANAGEMENT PRACTICES - Ms. Williams

MS. WILLIAMS asked if the Council would like the EQC staff to coordinate a brief panel presentation and seminar on BMPs for an upcoming meeting which would provide a basis for the Council decisions on the scope of the inquiry they want to pursue into BMPs this interim. The Council may choose to keep the focus narrow and assign specific related tasks to the Water Policy Committee or this topic may be added to Compliance and Enforcement. There are at least three potential definitions of BMPs. There is a very technical one which started out with treatment plants. There is the water quality definition which includes reasonable soil, land, and water conservation practices. There is also the concept of voluntary practices.

CO-CHAIR MESAROS felt that they should look at this from a broader scope. The Council could then decide in what direction they wanted to proceed.

XIII. EQC INDICATORS PROJECT - Mr. Mitchell

MR. MITCHELL stated that at the work plan meeting the Council decided not to revise, but to utilize the 1996 Indicators Report as a basis for this Council to make recommendations to the Legislature and to evaluate and prioritize environmental issues of concern. They have reproduced an additional 2,000 copies. He asked the Council if they wanted another mailing. Perhaps they wanted to use this report with the growth study.

CO-CHAIR COCCHIARELLA asked if local people, such as county commissioners, were involved in the first mailing.

MR. MITCHELL stated that this was sent to some local government persons.

MR. TOLLEFSON asked what the total mailing list would be if they sent this report to local government and county agencies.

MR. MITCHELL stated a ballpark figure would be around 300. Mailing would cost about 25 cents per report.

MR. TOLLEFSON felt it was important to get this report out before it became stale.

CO-CHAIR COCCHIARELLA felt the Growth Study Subcommittee should decide who the mailing should go to and perhaps there could also be a cover letter to generate interest in the subject and ask for some input.

The meeting adjourned for the day at 5:15 p.m. and reconvened at 8:00 a.m. on Friday.

XIV. CALL TO ORDER

CO-CHAIR MESAROS called the meeting to order at 8:05 a.m.

XV. ENVIRONMENTAL SELF AUDIT IMPLEMENTATION UPDATE -

Mr. John Arrigo, DEQ

JOHN ARRIGO, Administrator of the DEQ Enforcement Division, remarked it is his job to develop how the Department would process submittals of environmental audit reports. He submitted a handout which included a copy of the law, an implementation guide, the draft audit report form and a checklist to be used to review the audits which are submitted (**Exhibit 7**). The Act becomes effective on October 1st. Regulated entities which file self audits may be immune from administrative penalties but are not immune from other enforcement actions. The audit must be submitted on a form from the Department. The violation must be disclosed within 30 days from the date it is determined to exist. The regulated entities must cooperate with the Department to develop a compliance schedule if long-term clean up is necessary. If the violation is a pattern of similar violations that have occurred over the past three years, it is not eligible for immunity. If a compliance schedule is violated, that would not qualify for immunity.

The definition they arrived at for actual, substantial damage means measurable harm to the environment that constitutes significant degradation of the environment or poses an increased risk of morbidity to humans.

An environmental audit means a periodic, documented, voluntary internal assessment. For it to be periodic, it must be conducted at regular intervals. The first audit is not periodic. For the violation to qualify as being conducted under an audit, they need to have a series of audits. They have contemplated conditional immunity. They would receive immunity for the violation which was discovered during the first audit, but they would be required to do a second audit. If there was no second audit, they would have the opportunity to come back and assess penalties. The statute of limitations is two years. They are contemplating asking the regulated agency to waive the statute of limitations.

The form will be available in hard copy or electronically. The checklist goes through the criteria and limitations. Ultimately all decisions on immunity will be approved by the Director.

MS. SOUVIGNEY questioned who filled out the checklist. MR. ARRIGO explained it is used by the Department to organize their review of the audit.

MS. SOUVIGNEY questioned what factors were looked at to decide whether the company knowingly or purposely committed the violation. MR. ARRIGO stated that in the report form they ask if the violation was knowingly committed. Whatever criteria is submitted and whatever investigative information they can gather will be used to determine if it was knowingly or purposely committed.

MS. SOUVIGNEY further questioned if they looked at any potential economic benefit which may have occurred from the violation.

MR. ARRIGO stated that as far as assessing penalties, normally they would. However, the self audit law says they waive all civil and administrative penalties. EPA wants the economic benefit penalty to be collected. EPA has an economic benefit of noncompliance guideline which the Department considers when calculating civil and administrative penalties. This Montana Self audit issue conflicts with the EPA audit policy. They have discussed this with the EPA and have been told that the EPA will send the state a letter requesting its opinion on whether or not the

language in the law jeopardizes primacy. The State of Wyoming has already received this letter and responded. John North, with DEQ, believes the language is pretty broad and says if the failure to assess a penalty occurs and the EPA does not agree with that, they can decide whether or not the primacy is jeopardized. If primacy is jeopardized, they cannot provide immunity. The EPA has told them they will not delegate any new programs until this is cleared up. They have submitted a request to the EPA for authorization of a portion of the RCRA Corrective Action program which gives the Department the authority to require clean up at inactive hazardous waste sites. The EPA has approved the request but is waiting to send the notice until the self audit question is resolved. There is a Title V Program in the air quality program which expands DEQ's ability to permit an entire facility as far as discharge to air. DEQ will be submitting a request for authorization in early October but assume that won't be delegated immediately. Last legislative session the Department received authority to hire .38 FTE to begin development of the underground injection control program. Delegation requests to EPA for this program will probably be put on hold as well.

ERIC FINK, Environmental Protection Agency, related that there are two authorization applications which the state has submitted. As far as RCRA corrective action is concerned, EPA is waiting to see the equivalency or acceptability of the Montana self audit law. The Title V air program is in much the same situation. EPA will be sending a letter to the state asking for its interpretation of how the law affects Montana's ability to implement and enforce federally delegated programs.

SEN. BROOKE asked if the state had the right to examine how periodic the audits have been conducted.

MR. ARRIGO stated the state cannot require a regulated entity to do an audit. For the audit to be periodic there needs to be more than one audit.

CO-CHAIR COCCHIARELLA was concerned about the quality of the audits.

MR. ARRIGO stated they have tried to give guidance in their implementation guide. He felt that most entities will have a plan and present an organized systematic audit. The MSU Pollution Prevention Program is preparing self audit guides for small businesses.

CO-CHAIR COCCHIARELLA emphasized the importance of education and emphasized that it could be the key in giving people the ability to comply. She asked if the Department had prepared an educational piece.

MR. ARRIGO stated there was nothing organized at this point. The information will all be going on their web site home page. They would also be available for consultation and the staff would be trained to answer questions.

MR. SNODDY asked if industry could present its own audit schedules and checklist to the Department to alleviate some of the questions.

MR. ARRIGO stated they did not invite that submittal but as part of the form they do ask the entity to demonstrate to the Department that it is in fact a planned periodic audit.

MS. SOUVIGNEY asked that the EQC follow up on the letter from the EPA to the state and the state response. She felt the EQC should see the correspondence.

CO-CHAIR MESAROS asked for public comment at this time.

DON ALLEN, WETA, stated that education was a key part of the environmental BMPs implementation. There were extensive efforts made which included workshops.

PATRICK HEFFERNEN, Staff Forester with the Montana Logging Association, stated that education should be a challenge for the DEQ and the other agencies regarding the self audit legislation. Engaging the practitioners on the ground, by showing them how to prepare self audits, would create a situation of self awareness and be very effective.

ANN HEDGES, Montana Environmental Information Center, felt there would not be a lot of self audits because there is no guarantee of immunity. The conflict involves the economic benefit component of a penalty. She explained that Wyoming's law is similar to Montana's law. A lot of the questions the EPA presented to the State of Wyoming are the same questions which will be asked of the State of Montana. The Attorney General in Wyoming stated that where a federal program requires Wyoming to have authority to assess penalties, immunity is unavailable.

TOM EBZERY, representing Exxon, commented they have been involved with the self audit bill from the outset. The Legislature passed a statute. The EPA adopted a rule implying that an economic benefit penalty needed to be imposed. He found it curious that this bill was passed in April and the EPA waited until a few weeks before the bill would take effect to send a letter suggesting they be informed if there are any problems.

XVI. EQC MONTANA GROWTH STUDY

I. Overview

MS. COLHOUN related that the Council received three legislative requests to look into growth issues. SEN. JERGESON requested the Council to look into his resolution urging the study on the changing growth and land patterns in Montana. He asked that the study look into providing a road map for adoption of a nonregulatory means of encouraging producer ownership of agricultural land. SEN. HARGROVE requested that the Council look into his bill which provided incentives for landowners to put part of their land into conservation easements and then be able to choose where they would develop the other parcels. REP. SWANSON requested the Council look into clarifying the legal definition of tracts of record and whether government lots and quarter quarter section parts constituted separate tracts of record. MS. COLHOUN commented that the Council decided to make growth a priority issue and allocated .85 FTE toward the effort. The Council needed to identify and prioritize the issues.

Montana's population is expected to increase to one million by the year 2,000. That population is not consistent across the state. In some of the eastern counties population is decreasing and in some of the western counties population is increasing and population density is increasing. The

number of people migrating to Montana from other parts of the country is about the same as people migrating throughout Montana from one county to another. Of the people migrating to Montana from other states, half of them have preexisting ties to Montana.

One of the most notable changes in land use in Montana is the increase of residential lands. Over the past ten years, state staff has reviewed over 11,000 subdivision proposals which created a total of 34,000 proposed residential parcels. Flathead, Gallatin, Yellowstone, and Ravalli Counties accounted for 48 percent of the subdivision proposals.

MS. COLHOUN further commented that her overall sense regarding growth management efforts going on across the state is that there are a lot of local efforts, but there is not very much coordination among organizations or between counties and municipalities.

The Montana Consensus Council is preparing a policy dialogue on preserving rural landscapes, sustaining family farms and maintaining areas of biological and public values.

The Governor of Wyoming created a sub-cabinet on natural resources. They produced a guide of techniques which involved many various groups.

JOHN BEAUDRY, Stillwater County Planning Director, gave a presentation on various planning programs and projects in Stillwater County. He related that he has been the planning director in Stillwater County since 1982. They have had significant growth which has been quite diverse. The northern end of their county has declined in population. The I-90 corridor has had moderate growth at 14% in the Park City area and 15% in the Columbus area. The southern end has had 35% growth in the Absarokee area.

Most of their public works projects are in the high growth area with only one road project in the north end of the county. Their public works projects are in the area of \$25 million to \$30 million in costs which were necessary to accommodate the growth and adequately service the type of industries in their county.

The county tax revenues went from \$17 million to \$25 million. This year the revenues will be over \$29 million. Stillwater Mining started with a taxable value in 1986 of \$77,000 and this year they are looking at \$5.4 million. Referring to the taxable value in 1988, he stated that agriculture made up 25%, residential was 19%, commercial 7%, industrial 2%, railroad 3%, mining 12%, utilities 26%, oil and gas 5% and other personal property was 1%. Today agriculture is at 20%, residential stayed about the same, commercial went down slightly, industrial went up slightly, mining and utilities went up significantly. Stillwater Mining has a work force of over 570 people and it is projected to go up to 650.

The county developed their planning program based on community needs. They use the planning tools which are available to them. They are a general powers local government and are bound by the state statutes. Columbus has a master plan which was adopted in the early 90s and amended this year. The county is close to releasing a draft of its first master plan. Columbus has had zoning since the 1950s. The county does not have zoning and the sentiment of the population is against county initiated zoning. The county has been in the floodplain program for over 15 years with some preventative results.

Mine impact plans have worked quite well. The original Hard Rock Mine Impact Plan was developed in 1985. There was a major amendment in 1988 and they will be going through another major amendment by early next year. They do not always agree with the mine, but by working together they are able to produce a workable plan.

CO-CHAIR COCCHIARELLA asked if they shared their process and work plans with other counties.

MR. BEAUDRY explained that they do at conferences and meetings but that there is no program in place. They do participate in an economic development region, which is a five county region including Sweetgrass, Carbon, Big Horn, Yellowstone and Stillwater Counties. They provide their economic development plans to the other counties and to the regional entity. They work

closely with the town of Columbus. One reason other counties may not be initiating new programs is the volume of work they face. He does most of this on his own time.

CO-CHAIR COCCHIARELLA, referring to the 9% positive growth in population in Stillwater County and the fact that 1,024 were migrating people, asked if they kept track of where these people had lived before moving to Stillwater County.

MR. BEAUDRY stated that their assessor told them that people from every state in the nation, Canadian Provinces and the better part of the world now own real estate in Stillwater County. Most of those numbers are related to the mine development and those people are moving from Idaho, New Mexico, Colorado and Arizona which are other mining states.

REP. BEAUDRY asked if the planning tools they used would be applicable where there was no major growing function, like the mine. Bozeman is a town which would not have any related ongoing community function.

MR. BEAUDRY felt they would be applicable if the community had the flexibility to tailor the tools to meet their situation and their needs.

REP. BEAUDRY asked if he had any ideas about the overall growth in Montana.

MR. BEAUDRY stated he was specialized for his area. He added that the Department of Commerce has a demographic web site which provides information for every county and municipality in the state.

SEN. GROSFIELD asked MR. BEAUDRY if most counties knew their situation and would be able to put together a presentation with the level of detail he was able to provide.

MR. BEAUDRY did not believe that many counties have taken the time or delved into the detail that they have. He felt that the capabilities are out there. The people in his county have told them their future goals for Stillwater County.

SEN. GROSFIELD questioned how much authority went along with a master plan.

MR. BEAUDRY explained that a master plan by law is advisory to the county commissioners. Counties are to be guided by it in decisions on development issues. On subdivisions, there is a section the law that subdivisions need to conform to a master plan.

REP. GILLAN asked MR. BEAUDRY if he felt the County has built into the system any type of inducements to growth which may actually not allow for smart growth.

MR. BEAUDRY answered that the capital facilities end up being an incentive and oftentimes they are not financed through taxable value or the regular revenue stream. One of the problems they have in their county is that many of the grant programs are designed for low and moderate income people. When counties are in a growth situation, they may not qualify.

MR. SORENSEN asked if the change in subdivision laws which occurred in 1993 has caused the creation of a lot of large tracts.

MR. BEAUDRY stated that the change in subdivision laws has led to litigation and occupies a large portion of their time. They had more local influence before the changes. Now every detail is mandated. One of their last subdivisions involved five lawyers being present at the meetings. This is counter productive. There is a lot of controversy over the larger subdivisions in the rural areas. Some of the language in the new laws invited litigation. The changes made by the 1995 Legislation which added the language on who could sue and who could recover damages have caused them a lot of problems. The subdivider can recover damages and all the neighbors can also sue. The county is in the middle with the neighbors saying they will sue them if it's

approved and the subdivider saying he will sue them if it is not approved. They like the fact that the appeal is limited to 30 days.

MR. TOLLEFSON asked MR. BEAUDRY if he had any suggestions for this Council regarding growth issues in the state.

MR. BEAUDRY suggested working with the laws which are on the books. This needs to be looked at on a county by county basis. Use the planning tools which are applicable to the different circumstances. Economic development planning would be more applicable to the areas in decline while capital facility planning would be more applicable to those that are stable. Growth type planning issues need to be applicable to the areas which are growing. The baseline information is available from the Department of Commerce. The funding depends on where they were caught in I-105. The tools are in the statutes. He advocates local control. Local governments need flexibility and authority as well as the responsibility to manage their affairs.

2. Identification of Issues (Break-out Groups)

Report from Group B

MR. EVERTS explained they spent a lot of time discussing information. They discussed information being current, the importance of coordination, adequacy of the tools and resources. Growth costs were discussed. They felt it was important to gear the information toward the tools so they could utilize the tools more effectively. Other items included the impact on agriculture and resources. They also felt it was important to look at the statewide picture. An interesting sidelight to their discussion was, what do Montanans want for Montana. How do state policies impact growth. There was a suggestion to inventory those policies and look at the direction of the policies. The final issue they discussed was institutional jurisdiction. Where should the decisions based on growth be made - local levels, county level, etc. **(Exhibit 8)**

Report from Group D

MR. TOLLEFSON remarked the first thing they did was to define growth. They felt this should not only mean population increase but it should also involve land use changes, population shifts

and related economic development. The follow up to that would be what are the effects of this growth. They felt there was a need to define the state's role in any growth management initiative in a way that preserves local control. There was discussion about encouraging "compatible" growth, identifying areas where growth is appropriate and at the same time identify areas which are more sensitive to the effects of growth such as water courses, wildlife habitat, open spaces, etc. **(Exhibit 9)**

Report from Group A

CO-CHAIR COCCHIARELLA explained that their group felt there was a lack of information and fragmentation of issues, problems, and information. In Montana they cannot make decisions about wetlands or subdivisions because the information is not there on which to make informed decisions. They thought it was important for the subcommittee to focus on creating a toolbox for the tools. This would not involve coming up with new ideas, but pulling the information together for people to access. It was recommended that the EQC be the leader in discussing the issues that have been raised, create the toolbox, and then provide a forum for access to the tools **(Exhibit 10)**

Report from Group C

MR. SORENSEN stated their first issue was limited growth or stagnation due to inadequate infrastructure. They discussed a lack of local resources available for local planning. Some of the costs involved would include a professional planner, a master plan, and education efforts. They tried to sort out what the local role and the state role should involve. A lot of issues cross county boundaries. This would include wildlife movements, water quality, etc. There needs to be a bottom up approach from the state. The state should provide assistance, but not mandates. There may be environmental impacts on a lot of issues. They asked: What do Montanans see as the problems of growth? This could be loss of open space, agricultural land, etc. More time needs to be spent in identifying the problems. There hasn't been a lot of emphasis on market solutions for planning objectives. Colorado has used its lottery to set up a special fund to buy development rights from agricultural interests. This has been quite successful. Some other areas have used a real estate transfer tax to set up a special fund to buy development rights. Another

idea was to put an additional tax on rural subdivision development which would go into a special fund, earmarked for that purpose. **(Exhibit 11)**

XVII. SUBCOMMITTEE ORGANIZATIONAL MEETINGS

The Subcommittees broke for their respective organizational meetings at this time.

XVIII. SUBCOMMITTEE CO-CHAIR REPORTS

CO-CHAIR MESAROS asked representatives from the Subcommittees to present their reports.

1. Water Policy Subcommittee

REP. TASH stated they will be immediately involved with TMDL implementation. They have set up a meeting for November 13th, the day before the next EQC meeting. The full Council will be hearing a report from Liter Spence on the instream flow leasing provisions. They will also take under consideration projects such as task forces and basin groups.

2. Growth Study Subcommittee

MR. SORENSEN stated that he and MR. TOLLEFSON will co-chair the Subcommittee. They feel they will need to focus their attention on what the statewide concerns are, particularly relative to the statutory requirements of this Council, in respect to the environmental quality of the state. They will do more scoping and look at the issues discussed today. They plan to put together a survey which will go to the counties. This survey will contain questions regarding growth and focus on what tools they use, what problems they have, and whether or not growth is a problem in their area. A draft survey should be ready for the Subcommittee meeting which will be November 13th. It will be presented to the Council at the next meeting and following the meeting will be mailed to identified individuals.

The issues which have been brought to them by legislators will need to be addressed. They will be looking into some minor changes in subdivision law and tax implications of land subdivision.

XIX. EQC AND THE FUTURE, A COUNCIL DISCUSSION

SEN. MESAROS stated that with term limits in the near future, the Co-chairs and the staff wanted some feedback from the new members on the Council regarding their needs and concerns about being a new member on the Council. Historically, the Council has relied upon the memory and experience of carry-over members.

SEN. MCCARTHY remarked that she needed to know more about the goals of the Council.

REP. OHS did not have any concerns. He knew this was a very busy Council. He feels fortunate to have the opportunity to see what is really behind the environmental issues.

MR. SNOODY stated he was a little overwhelmed by the volumes of information. He is not quite sure of the direction of the Council as well as the longterm goals.

REP. GILLAN commented that she needed more specific direction of the action required of her as a Council member. She needs a little more background information, but now feels more comfortable on who she should call to receive more in-depth information on a particular issue.

REP. BEAUDRY stated that as an engineer he likes to see projects completed. This is like the rest of the legislative process, it's a little like herding butterflies.

CO-CHAIR MESAROS stated their goal is not necessarily to create legislation. Legislation may evolve from certain activities of the Council. When addressing issues such as water policy or growth management, if they recognize that responsible changes need to take place legislatively, they will proceed to do so. A lot of their work has evolved from prior sessions.

CO-CHAIR COCCHIARELLA suggested the members discuss the future of the Council.

MR. TOLLEFSON questioned why term limits would change the complexion of the Council if the Council itself had term limits.

REP. OHS felt it was the legislative experience which would be missed on the Council.

SEN. BROOKE stated that if the legislature decided to eliminate the EQC it seemed to her that through many other avenues there is always a demand for interim work. The EQC or something similar would be born again. The question for the Council to consider is how to eliminate the demise and rebirth in order to have some type of continuity throughout the time of term limits. Legislative sessions are too short to deal with a lot of the controversial problems which come up and need to be assigned to a study committee. The challenge is to keep the EQC alive through the transition.

REP. TASH felt that the EQC is a consensus builder. They need to justify their existence the same as any interim committee. They need to prove they are effective by the ability to communicate and interpret the natural resource issues involving the EQC. It is an educational process. Consensus building allows for reaching solutions in a better manner than deciding issues based on majority vote input.

MR. SORENSSEN related that they need to demonstrate good work. They did some very good things last interim. Many people have a high level of respect for the work that this Council has accomplished. The Council has chosen some very good issues to work on this interim. If they do good work, it will speak for itself. He has been very impressed with the level of expertise and diligence of the staff.

MR. TOLLEFSON suggested that perhaps legislators who had reached their term limit could serve as public members.

SEN. BROOKE stated there is always some irrational thought to eliminate the EQC.

CO-CHAIR COCCHIARELLA asked for public comment.

DON ALLEN, WETA, stated this is something which needs to be discussed. The entire legislature needs to look ahead and consider the changes which will occur.

REP. BEAUDRY suggested the EQC meet during the session to help maintain continuity.

SEN. GROSFIELD stated that the EQC has decided to look into the growth management issue. This bipartisan group looked at a problem which is arising and decided to make it their priority. That is very positive and he would like to see it maintained.

MR. EVERTS explained that the EQC has traditionally reacted to legislative study mandates. Because it is a statutory committee with statutory duties, it has also developed its own studies. The Council has a broad statutory mandate to oversee all the state's natural resource environmental programs and issues. Another purpose of this Council has been governmental accountability and citizen access to legislators on these issues.

CO-CHAIR COCCHIARELLA, referring to the Council member update, asked if the Council members considered that portion of the agenda a worthwhile effort.

MR. SORENSEN felt it was well worthwhile.

SEN. CRISMORE and REP. TASH both commented that they liked the updates and found them beneficial.

MR. SORENSEN commented on the loss of participation by the Governor's Office.

CO-CHAIR MESAROS agreed and stated he would follow up on the above-mentioned concern.

CO-CHAIR MESAROS expressed concern whether the general public knew what the EQC is all about. He felt they were lacking in the area of PR. The Co-chairs had discussed the possibility

of public service announcements, perhaps by the Governor. He suggested holding some of their meetings out of town.

MR. TOLLEFSON was in favor of out-of-town meetings and suggested this be coordinated with some local event or issue which would have local application and would pique the interest of the public.

SEN. CRISMORE felt they needed to be reviewing or overseeing something which is occurring in the area which would give them a purpose for being there. In this regard, the people in the area would feel the Council was concerned enough to have an interest in their concern.

REP. TASH spoke in favor of a public service announcement which would give the Council much needed visibility.

CO-CHAIR COCCHIARELLA suggested forming a PR Subcommittee to work with the staff to set up locations and dates for the meetings held outside of Helena and also to work on public service announcements. She further suggested that this Subcommittee be a smaller group of only two or three members which could make decisions during a conference call.

REP. BEAUDRY, REP. TASH and CO-CHAIR COCCHIARELLA will be the members of the PR Subcommittee.

MR. EVERTS explained that he has not found the rules for the enforcement committee. He will keep looking for that set of rules. The Council wanted to see those rules before acting on the draft rules.

CO-CHAIR COCCHIARELLA suggested adopting the current rules and procedures with the potential for future amendment.

SEN. MCCARTHY MOVED THE DRAFT RULES BE ADOPTED. REP. TASH SECONDED THE MOTION. THE MOTION CARRIED UNANIMOUSLY.

XX. OTHER BUSINESS

SEN. GROSFIELD reported that there was a situation in Yellowstone Park which concerned him. The Park Service is proposing to chemically sterilize creeks to kill fish and then stock those creeks with native fish. The report stated that success depends on complete removal, but a high proportion of the projects have not been highly successful. The report goes on to say that as a result this can cause some downstream fish to be killed as well. A lot of this will take place in Wyoming. However, they are also talking about upstream in Montana. His bigger concern is that the Fish, Wildlife and Parks Department in Montana is contemplating using this procedure in some of the streams around the state. They are replacing the fish, but they are also introducing a chemical which violates the water quality standards. If private persons are not allowed to introduce pollutants into water, should state agencies be doing so? The comment period for this will close before the next EQC meeting. He suggested perhaps the Council could have a presentation from Fish, Wildlife and Parks so they would have a better understanding of the issue.

MR. PILCHER commented that the Montana Water Quality Act does recognize and allow the Department of Fish, Wildlife and Parks to proceed with necessary projects which may alter the water quality but this can only be done with the specific approval of the DEQ. Generally they will select a water body where they can actually control both inflow and outflow so that by the time the chemical is being used and there is any release from the treated stretch of water, the chemical has dissipated and is no longer harmful.

CO-CHAIR MESAROS asked the Water Policy Subcommittee to look into the concern raised by SEN. GROSFIELD.

**XXI. CONFIRMATION OF EQC INTERIM CALENDAR AND SCHEDULE OF OUT
OF HELENA EQC MEETINGS**

CO-CHAIR MESAROS explained that the staff identified three dates for out of Helena meetings as Friday - November 14, 1997, Friday - May 8, 1998, and Friday - June 26, 1998.

SEN. MCCARTHY stated that in the Water Policy Subcommittee there was discussion about the task force project in Dillon. She wondered if May might be the right time for a meeting in that area.

REP. TASH felt that spring would be a good time. The Big Hole River Task Force would have some conclusive studies on the return flow by that time. They would be interested in working with the Council on a meeting place.

MR. TOLLEFSON stated that they also discussed this in their subcommittee and felt that November 14 would be a good date to have a meeting in a growth hot spot in Montana such as Missoula, Bozeman or Kalispell.

SEN. BROOKE suggested holding a meeting in Hamilton since she had heard that Ravalli County was the fastest growing county in the United States.

CO-CHAIR COCCHIARELLA stated she could not remember an EQC meeting being held in Missoula since she had been on the Council. There are open space projects, the pipeline EIS, Stone Container - which could be a tour, Plum Creek and Stimson Lumber, local growth planning activities, and a TMDL water quality district.

SEN. CRISMORE would like to see one of the meetings in northwestern Montana. They have the Rock Creek project, the ASARCO mine at Troy, and the Columbia Basin project.

MR. TOLLEFSON felt they should also look at eastern Montana.

SEN. GROSFIELD suggested the Council not plan too far in advance because issues may surface in an area where they should hold a meeting.

CO-CHAIR MESAROS remarked it was important to have a geographical balance.

SEN. BROOKE stated she was very much in favor of meeting out of Helena. She added that one of the main charges of the Council is oversight and she felt that staff from other state agencies would not be able to report to the Council at out of Helena meetings.

CO-CHAIR MESAROS stated that the November 14th meeting would be held in Missoula.

MR. MITCHELL stated that he had received a letter from the DNRC Service Forestry Bureau addressed to the EQC in which they explained that in November they would be starting their 1998 field audit season. They anticipated some loss of field audit team members and were looking for suggested replacements. This is a commitment of people from around the state who assist the DNRC and self audits teams in conducting BMP audits. He stated that if the Council members had names of people willing to serve on the field audit teams they could forward the names either to the Service Forestry Bureau in Missoula or to his office.

XXII. ADJOURNMENT

There being no further business, the meeting adjourned at 2:00 p.m.